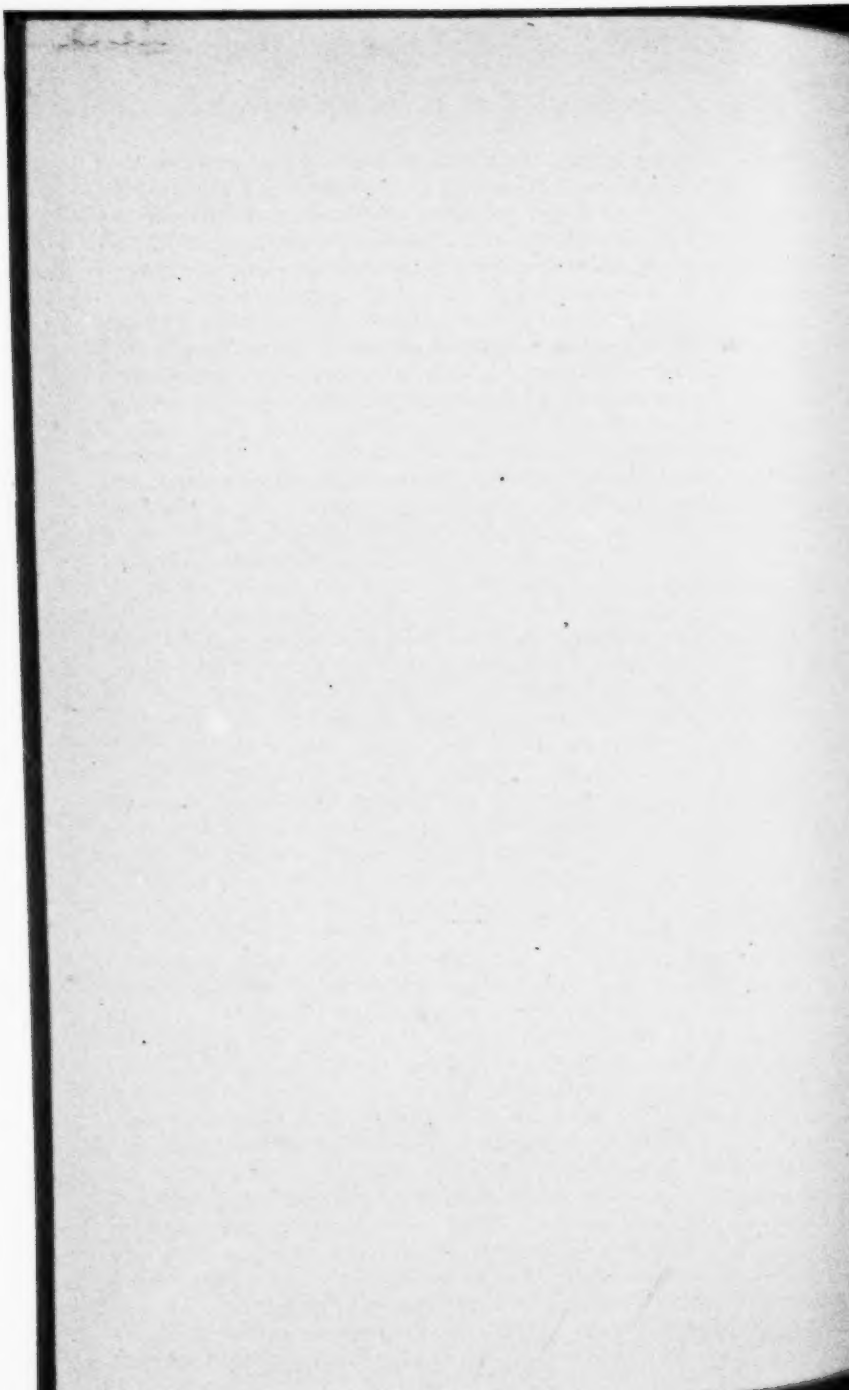

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No. 98.
Brf. of Roemer for Appellee

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

The questions to be considered in this case are certified to this court by the United States Court of Appeals for the Seventh Circuit. The certificate is as follows:

"In this case, duly argued and submitted to this court, there arise questions of law concerning which this court desires the instruction and advice of the Supreme Court of the United States.

"The Appellee, Patrick Shea, exhibited his libel in the District Court of the United States, for the Eastern District of Wisconsin, against the steam propeller Osceola, her tackle, apparel and furniture, to recover damages for personal injuries sustained under the circumstances herein stated.

"At the hearing below, the District Court pronounced for the libellant awarding him damages for the injury sustained, and from the decree of that court in that behalf, the respondents below, the owners of the vessel, have appealed to this court.

"The owners had supplied the vessel with a moveable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed 1050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head of wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was

caught by the wind and turned outward broadside to the wind and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel, acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in "requiring and permitting the work of unshipping said gangway to be done while said vessel was at sea and running against the wind." The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court, are:

"First: Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

"Second: Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

"Third: Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

"These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision."

ARGUMENT.

The questions certified may be considered together, for if a vessel or its owners are responsible, as a matter of law, to an ordinary seaman for an improvident or negligent order of the master in respect to the navigation or management of the vessel, whereby the seaman sustains personal injuries, then the first and third questions certified should be answered in the affirmative, and the second question in the negative.

The proceeding in this case is *in rem*, and therefore, at the very threshold of the cause, is presented the question whether a maritime lien exists, in favor of the appellee under the facts as set forth in the certificate. Unless a lien exists by virtue of the Statute of Wisconsin or by the maritime law, or unless appellants have waived the objection by appearing personally, giving an undertaking for the release of the vessel and litigating upon the merits, the action cannot be maintained.

The sovereignty of the State of Wisconsin extends to the center of Lake Michigan, and its laws so far as they do not conflict with the laws of the United States passed in the regulation of commerce and navigation are operative within the boundaries of that state. The boundaries of the state of Wisconsin are fixed by Secion 1 of Article II of its constitution. Section 1, Article IX, of its constitution gives the state "concurrent jurisdiction on all rivers and lakes bordering on the state so far as such rivers or lakes shall form a common boundary."

"It is also settled that, if a state statute gives a right of action touching a subject of maritime nature, the admirality can administer the law by a proceeding *in rem*, if the statute grants a lien, or *in personam*, no lien being granted."

The Corsair, 145 U. S., 335.
Bigelow vs. Nickerson, 70 Fed. Rep., 113.

Sec. 3348, Wisconsin Statutes of 1898, provides as follows: "Every ship, boat or vessel in navigating the waters of this state shall be liable for and the claims or demands hereinafter mentioned shall constitute a lien on such ship, boat or vessel"

* * * * * * * "For all damages arising from injuries done to persons or property by such ship, boat or vessel;" * * * * * * * "Such lien may be enforced by proceeding in admirality, etc."

Whether this statute creates any new cause of action or merely deals with causes already maintainable at common law or in admiralty has never yet been determined by judicial construction. To subserve any beneficial purpose, however, it would seem that in passing the act the legislature intended to make every ship, boat or vessel navigating the waters of Wisconsin responsible in every case of injury to persons or property when the injury results from a marine tort whether the ship, boat or vessel or its owners would be liable independent of statute or not.

But if the statute merely applies to causes *in personam* already maintainable under the statute, the common, or the maritime law, it is submitted that it is effective to create liens in all cases within its scope, and that such liens may be enforced by proceeding *in rem* in admiralty.

Mendell vs. The Martin White, Hoff. Op. 450; Case No. 9, 419 Fed. Cases.
The J. E. Rumbell, 148 U. S., 1.
The Oregon, 45; Fed. Rep., 62.
The Oregon, 158 U. S., 186.
The J. F. Warner, 22 Fed. Rep., 342.

ADMIRALTY JURISDICTION.

The subjects of admiralty jurisdiction includes "all affairs relating to mariners, whether ship officers, or common mariners, their rights and privileges respectively; their office and duty; their wages; their offences whether by willfulness, casualty, ignorance, negligence, or insufficiency, with their punishments."

Chamberlain vs. Chandler, 3 Mason, 242.

The Rule of the English Courts that unless the owner is liable

at common law, the vessel cannot be held in admiralty, has been rejected in this country.

Homer Ramsdall Transportation Co., vs. La Campagni Generale Transatlantique, 182 U. S., 406.

"Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion on the subject."

The Mariana Flora, 11 Wheat., 54.
The Palmyra, 12 Wheat., 1.
The Explorer, 20 Fed. Rep., 135.
The Wanderer, 20 Fed. Rep., 140.
The Max Morris, 24 Fed. Rep., 860.
The Max Morris, 28 Fed. Rep., 881.
Steamer Max Morris vs. Curry, 137 U. S., 1.

If it should be determined that the proceeding should have been commenced *in personam* and not *in rem*, the question cannot be raised at this time.

The appellants personally appeared in the action, gave a bond for the release of the vessel and answered the libel. By thus appearing they became parties to the action and not havnig raised the objection by exception to the libel must be deemed to have waived the same. Even if the libel should not contain sufficient allegations to show a cause of action against the appellants *in personam* such amendments would be permitted after decree.

Betts Adm. Pr., 99.
The Zenobia 1, Abb. Adm., 48.
Roberts vs. Huntsville, 3 Woods, 386.
The Union, 4 Blatchf., 90.
The White Squall, 4 Blatchf., 103.
The Monte A., 12 Fed. Rep., 331.
The Williamette, 70 Fed Rep., 874.
Leathers vs. Blessing, 105 U. S., 626.

Chamberlin vs. Ward, 62 U. S., 554.
The Charles Morgan, 115 U. S., 69.
2 Brown Civil & Adm. Law, p. 400.
The Warren, 2 Ben., 498.
The Bilboa, Lush, 149.

The reported cases show that there is a conflict of opinion as to whether or not the vessel and its owners are liable in admiralty for the negligence of the master in the management and navigation of the ship, proximately causing injury to an ordinary seaman. The line of cases holding that the vessel and its owners are responsible in such cases is certainly supported by the better reasoning.

Peterson vs. The Chandos, 4 Fed Rep., 645.
The Clatsop Chief, 8 Fed. Rep., 163.
The Titan, 23 Fed. Rep., 413.
The A. Heaton, 43 Fed. Rep., 592.
The Julia Fowler, 49 Fed. Rep., 277.
The Frank and Willie, 45 Fed. Rep., 494.
McCullough's Admx. vs. Steamboat Co., 20 U. S. App., 570; 61 Fed. Rep., 364.

In Peterson vs. The Chandos, *supra*, Deady, D. J., says, "But the mate being the immediate agent and representative of the master—his very right hand, as it were—acting within his view and under his personal direction, I think he ought not to be considered the fellow servant of the men in the forecastle within this rule, but rather the *locum tenens* of the master and owner, for whose negligence, resulting in injury to any of the crew while in the correct discharge of their duty, the *vessel* and master ought to be responsible.

"The relation between the master and sailor at sea is more of a parental character than that between the employer and employee on shore—particularly in the great transportation lines, workshops, and factories of modern times; and therefore, the former may and do rely more for their safety and well-being upon the foresight and personal direction of those in authority over them

than the latter. Again, an employee on shore, who is unwilling to incur the risk arising from the negligence or want of skill of a fellow servant, may ordinarily quit such employment, but a seaman must remain on board, at least until a port is made, however unskillful or negligent the mate may be."

In the Clatsop Chief, *supra*, Deady, D. J., says, "And while it does appear that the deceased was in the service of the same person as the master, and engaged in the same general employment, it does not follow from this that he was a fellow servant of the master in that sense which would exonerate the common employer from liability for an injury to one of them caused by the negligence or misconduct of the other.

"The deceased was merely a fireman on the Chief, and as such subject to the orders of the master. He was an inferior servant injured by the misconduct of a superior one, for which injury there is much authority and more reason for holding the common employer liable."

In The Titan and The Hills, *supra*, it was held that a deck hand may recover for an injury caused by a collision due to the negligence of a pilot who was at the time in command; following Chicago, M. & St. P. Ry. Co. vs. Ross, 112 U. S., 377. Wallace J.: "Treating the pilot as the master, he was responsible for the management and navigation of his vessel. He was negligent in failing to have a lookout stationed where he ought to have been, and negligent otherwise. The collision was solely the result of his negligence, and the libelant had no part or lot in it."

In A. Heaton, *supra*, it was held that a seaman, permanently injured in the performance of his duty on ship, particularly in consequence of the negligence of the master in not keeping a rope in proper condition and repair can maintain a libel against the ship to recover damages for the injury. Mr. Justice Gray, speaking for the Court, says, "The case is thus resolved into the question of law, whether a seaman, permanently injured in the performance of his duty, on shipboard, in consequence of the negligence of the master in not keeping a rope in proper condition and repair, can maintain a libel in admiralty against the ship to recover damages for the injury, beyond his wages to the end

of the voyage and the expenses of his cure, so far as the injury is susceptible of cure. This question, both as to the jurisdiction and as to the merits, appears to us to be substantially determined by the decision of the Supreme Court. In England, indeed, it appears to be unsettled whether a libel *in rem* can be maintained in admiralty for a personal injury. But on principle, as observed by a recent English writer, it would seem difficult to deny the justice of the view that personal injuries inflicted by a ship might confer a maritime lien, or to formulate a satisfactory reason why damages occasioned to a mans' property should give rise to rights of a higher nature, or be the subject of a more effective remedy, than an injury occasioned under the same circumstances to his person. 4 Law Quar. Rev., 388. In this country, it has been established by a series of judgments of the Supreme Court of the United States, that a libel in admiralty may be maintained against the ship for any personal injury, for which the owners are liable under the general law and independently of any local statute; accordingly passengers have often maintained libels, as well against the ship carrying them as against other ships, for personal injuries caused by negligence for which the owners of the ship libelled were responsible. The New World, 16 How., 469; The Washington, 9 Wall., 513; The Juniata, 93 U. S., 337; The City of Panama, 101 U. S., 453, 462. The sixteenth rule in admiralty, which directs that 'in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only,' does not effect libels for negligence. It was argued in behalf of the owners that they were not responsible to the seamen for the negligence of the master, because the two were fellow servants; and a Scotch case was cited, where in an action at law it was so held. Leddy vs. Gibson, 11 Ct. Secc. Cas., (3d Ser.) 304. But we are unable to reconcile that decision with the recent judgment of the majority of the Supreme Court in Railway Co. vs. Ross, 112 U. S., 337, 5 Sup. Ct. Rep., 184, which conclusively binds this court." The point there decided as stated by Mr. Justice Field in delivering judgment was that the conductor of a railway train, who commands its movements,

directs when it shall start, at what stations it shall stop and at what speed it shall run, and has the general management of it and control over the persons employed upon it, is in no proper sense a fellow servant with the fireman, the brakeman, the porters, and the engineer upon the train, but represents the company and therefore, for injuries resulting from his negligent acts, the company is responsible. 112 U. S., 390, 394; 5 Sup. Ct. Rep., 190, 192. The reasoning, upon which it was there held that the engineer might maintain an action against the owner of the railroad train for the negligence of the conductor, applies with greater force to a suit by a seaman against the owners of a vessel for negligence of the master, while she is at sea, beyond the reach of the owners, and the seaman is subject to the absolute control of the master, and cannot, if he would, leave the vessel or throw up his engagement. No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law. Courts of admiralty have always considered seamen as peculiarly entitled to their protection. Seamen may recover their wages by libel *in personam* against either the owners or the master, or by libel *in rem* against the ship. Sheppard vs. Taylor, 5 Pet., 675, 711; Bronde vs. Haven, Gilp., 592; Temple vs. Turner, 123 Mass., 125, 128; Rule 13 in Admiralty. Their lien on the ship or its proceeds takes precedence of all other claims, except, perhaps, claims for salvage, or for damages by collision owing to the fault of their ship. Hen. Adm., Sec. 69, and cases cited; Norwich Co. vs. Wright, 13 Wall., 104, 122. A seaman, taken sick or injured or disabled in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. That right, indeed, grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for a restriction of other rights and remedies. Harden vs. Gordon, 2 Mason, 541; The George, 1 Sum., 151;

Reed vs. Canfield, Id., 195, 199, 202. It does not, therefore, displace or effect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts. In Sherwood vs. Hall, 3 Sum., 127, Mr. Justice Story, sitting in admiralty, held that the act of the master shipping a minor as a seaman, knowing it to be against the will of his father, was a tort for which the owners of the ship were responsible in damages to the father, although positive and direct knowledge of the facts was not brought home to them; and said:

"Constructive notice is brought home to them by the knowledge of their agent, the master. * * * Upon the well-established principles of the maritime law, in cases of this sort, the owners are responsible for the torts of the master in acts relative to the service of the ship, and within the scope of his employment in the ship. * * * In cases of collision, and injuries from negligence and illegal captures, and other torts from the fault of the master, the owners are, by the maritime law, made responsible for his acts and omissions of duty." Id. 131, 132.

In Leathers vs. Blessing, 105 U. S., 626, 628, a merchant, who had gone on board a vessel expecting to find goods consigned to him, and had been there injured by the fall of a bale of cotton which, as the master knew, had been insecurely stowed, maintained a libel against the owners as well as the master; and it was assumed that the libellant's case would have been clear if he had been an officer, seaman, passenger, or freighter. In the high court of admiralty of England, Dr. Lushington, in a collision cause, while awarding damages to the owners of the vessel not in fault, denied them costs, because her master had not ordered out a boat to save the life of a seaman who had fallen overboard from the guilty vessel and was drowned; and said:

"I must hold here, and I ever shall hold, that the owners of a vessel are responsible for the whole conduct of the master whilst on board his vessel, and in command of that vessel. I do not mean to say that they can be responsible, criminally speaking, for an act he may have committed of a criminal nature, for, of course, in that case the responsibility and the punishment can attach only to the wrong-doer; but, civilly speaking, the owners

are responsible for any deviation from that line of conduct which it behooves a master to perform, not simply in the navigation of the vessel, and in the care of his own seamen, but in the care of those who may be thrown on board his ship by an accident of this description, and for the performance of any office of humanity. The St. Lawrence, 7 Notes Cas., Adm. & Ecc., 566, 559, 14 Jur., 534."

In the case of The Julia Fowler, *supra*, the mate was in command of a vessel and under his direction and inspection a triangle was rigged surrounding the mast on which the seamen were at work scraping the main mast. The rope which held the triangle, was improperly attached and of doubtful sufficiency. The rope gave way and a seaman at work upon the triangle fell upon the deck and sustained personal injuries. A libel was filed against the vessel for personal injuries. It was said, "The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seaman, and the deliberate use of rigging or *methods plainly unsafe*, affects both ship and owners with liability for the consequent damages. * * * The libelant had nothing to do with preparing or rigging the triangle; but when it was ready, he was ordered aloft to work upon it, and obeyed."

It was held in The Frank and Willie, *supra*, that where a dangerous manner of unloading a cargo is known to the mate while in charge of a vessel, and continued, and a seaman is thereby injured, the vessel is liable for the injury. It was said in the opinion: "It has been long held the ship's duty to use all reasonable means to cure seamen or their hurts in the ship's service, the neglect of which makes ship and owner liable. It would be anomalous to enforce such a duty to cure hurts, but none to avoid them."

In McCullough's, Admx., vs. Steamboat Co., *supra*, the master of a steamboat, while in command and directing her movements, was held to be a vice-principal of the owner, and not a fellow servant of the engineer, so as to prevent recovery of damages from the owner for the death of the engineer by a collision due in part to the master's *negligence*.

To the same effect see also Keating vs. Pac. Steam Whaling Co., 21 Wash., 415.

Now adverting to the cases in admiralty holding that the master and common seaman are fellow servants, it will be observed upon examination that in each case the act which resulted in the injury did not result from the mere matter of control of the seamen or the management and navigation of the vessel.

In The Miami, 93 Fed., Rep. 218, it was held that where the mate of a vessel after giving an order to certain seamen, proceeded to assist in its execution and by their negligence another seaman was injured, the mate, while so engaged, was not acting as a master or vice-principal, but as a co-employee; and hence that the ship was not liable for the injury so received. The court says: "There is no force, therefore, in any suggestion that an improper or negligent order of the mate caused the accident. That officer undertook to carry out his own order. * * * When participating in this particular work the mate was not acting as master or vice-principal, but as an ordinary seaman or, at most as the foreman of a gang performing ordinary seaman's work."

In Oleson vs. Oregon Coal & Navigation Co., 44 C. C. A., 51; 104 Fed. Rep., 574, the negligence claimed consisted in the leaving open of the after hatch of the ship, through which the libellant fell. The injury was, therefore, not the result of any negligence or improper order of the master in the management or navigation of the vessel. It was not even shown that the mere leaving open of the hatch was due to the negligence of any officer of the ship.

CASES AT LAW.

The principal cases relied upon by claimants in support of their contention that the master of the vessel and the appellee were fellow servants, are cases brought and tried in common law courts and are clearly distinguishable from the case at bar.

The case of Gabrielson vs. Waydell, 135 N. W., 1, has no

application to the case at bar in support of the appellant's contention. That case held that the owners of the vessel could not be held liable for the willful and malicious beating of a seaman by the master of a vessel while upon the high seas for the reason that such an act, being of a criminal nature, is not in violation of any duty imposed upon the owners by maritime law. That decision may briefly be stated as follows: If the master while in control of the crew, should assault, and beat one of them causing him great bodily injury, the owner will not be liable; but when the negligent act complained of arises out of and is the direct result of the authority over the crew conferred upon the master by the owner, the owner is liable. That case, therefore, strongly supports the contention of the libellant that with respect to the giving of the improper and inconsiderate order to take out the gangways under the conditions then existing, the necessary obedience to which order resulted in the libellant's injury, the master was the representative of the owner and not the fellow servant of the libellant.

The case of Hedley vs. Pinkey & Sons Steamship Co., 1, L. R. Q. D., 58, is based upon the doctrine of Wilson vs. Merry, which has been frequently referred to in the courts of this country, but never accepted unqualifiedly by any of them. The severity of the doctrine and its manifest injustice led to the passage of the Employers' Liability Act in England. Sherman and Redfield on Negligence (5th Ed.), Sec. 227, 228. In the Hedley case the injury was not in consequence of the obedience to the orders of the master of the vessel. It was the result of the careless omission on the part of the master of the vessel in performing work of a fellow servant, and not of the negligent exercise of his power and authority over the crew.

In Kelleck vs. Deering, 161 Mass., 469, the injury was caused by the negligence of the mate in constructing a triangle and ordering the seamen to use it. It was held that the owner was not liable for the reason that the negligence of the mate was that of a fellow servant of the injured man. Holmes, J., who wrote the opinion for the court, refers to the case of the A. Heaton, The Frank & Willie and Julia Fowler as being rendered in defer-

ence to the Ross case, which latter case is in conflict with the doctrine of the Massachusetts' Supreme Court. However, at the conclusion of the opinion, is found the following significant statement, "Under these circumstances the Circuit Court cases, (referring to The Heaton, The Frank & Willie and Julia Fowler) do not seem to us a sufficient reason for departing from the common law because the accident happened on board ship. Moreover it is very plain that we cannot adopt the admiralty law as a whole. We cannot divide the damages when the plaintiff has been guilty of contributory negligence as was done in The Julia Fowler."

The only case in which the precise point in question has been squarely raised and decided is the case of Thompson vs. Hermann, 47 Wis., 602. The complaint charged that while a heavy sea was running, and the vessel was pitching and rolling heavily, the jaw rope of the main gaff parted and the gaff was unshipped and swung over into the main rigging, and that the plaintiff, with other seamen, was ordered by the master to adjust the gaff, by standing upon the lower boom, and pulling upon the bow-line fastened to one of the horns of the jaw of the gaff, and which was very likely and apt to slip from said horn, which was very smooth, worn and slippery, and cause plaintiff to fall from the boom to the deck below and sustain injuries. Upon a demurrer to the complaint it was held that the common seamen on a vessel at sea is bound to submit to the judgment and discretion of the master and obey his orders and the fact that a seaman, on receiving from the master an order, and being commanded to perform it in a manner or by means unnecessarily dangerous, and is injured in consequence of his obedience to such order, will not prevent him from recovering from the owners for the personal injuries caused by the master's negligence. The opinion is replete with authorities and worthy of careful consideration. It has never been doubted, questioned or criticised by the Supreme Court of Wisconsin in any case since. The case of Matthews vs. Case, 61 Wis., 491, notwithstanding appellants' contention, is not in conflict with the views expressed in the Thompson case. An examination of the cases will show that they are in harmony,

and clearly illustrate the vital distinction. In the Matthews case the injury was due to the mate's own negligence, and not to that of the master.

It is contended by appellants that if the second question certified is to be decided according to the common law, the question must be answered in the affirmative upon the authority of the case of Railway Co. vs. Conroy, 175 U. S., 323. The general rule exempting the common master from liability to one servant for injuries caused by the negligence of a co-servant, is not disputed. It is also conceded that the reason of the rule, according to the better considered cases and weight of authority, is that the ordinary risks of the employment, of which the negligence of co-employees is one, are taken into consideration by both parties in agreeing upon the terms of the contract of employment, and the compensation for the same, and that, therefore, every person entering the service of another impliedly agrees to take upon himself all the ordinary risks of the employment, including the negligence of competent fellow servants.

Union Pacific Ry. Co. vs. Fort, 17 Wall, (U. S.), 553.
Railway Co. vs. Ross, 112 U. S., 377.

But to the general rule there are certain well defined exceptions, which arise where the reason of the rule ceases, and are recognized by both State and Federal courts. Some of these exceptions are applicable to the case at bar.

Where a master abdicates from control and management of his business, and puts the whole power of superintendence into other hands, he necessarily has one or more vice-principals. It is, therefore, universally agreed in America that any person to whom is committed under such circumstances the entire control of all the servants, including the power to hire and discharge, is a vice-principal for whose negligence in the matter of the control of the servants, and the management of the business, the master is liable to the servants. It is in like manner agreed that the manager of any distinct department of a varied and extended business, having such power in his department, is a vice-principal with respect thereto.

Sherman & Redfield on Negligence (5th Ed.), Sec. 230.
Railway Co. vs. Ross, 112 U. S., 377.
Railway Co. vs. Baugh, 149 U. S., 364.
Railway Co. vs. Peterson, 162 U. S., 347.
Railway Co. vs. Keegan, 160 U. S., 259.
Railway Co. vs. Conroy, 175 U. S., 323.

The so-called New York rule, as announced in Crispin vs. Babbitt, 81 N. Y., 516, and confirmed by later decisions of that court, has been generally followed in this country. The English rule, which practically refuses to recognize the doctrine of vice-principal, is not followed by any American court.

"Under any consistent application of the New York rule, therefore, the master is represented, as by a vice-principal, by any one to whom he deputes the power of giving orders, which must be obeyed without or before appeal, and he is responsible for those orders as much as though they were his own. His deputy in these and all similar respects is his vice-principal."

Sherman & Redfield on Negligence (5th Ed.), Sec. 233 and cases cited.
20 Am. & Eng. Ency. of Law, 147.
Johnson vs. First National Bank, 79 Wis., 414.

While the Conroy case in express terms overrules the Ross case, and rejects the superior servant limitation as recognized in Ohio and Kentucky, it does not abolish the vital distinction between the relation of a vice-principal, who is invested with the whole power of superintendence, and that of a superior servant, either a boss or a foreman of a gang of men engaged in doing a certain piece of work.

Mr. Justice Shiras, speaking for the court in the Conroy case, says, after reviewing a number of cases, on page 340, "Without attempting to educe from these cases a rule applicable to all possible circumstances, we think we are warranted by them in holding in the present case that, in the absence of evidence of *special and unusual powers* having been conferred upon the conductor of the freight train, he, the engineer, and the brakeman, must be

deemed to have been fellow servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another." Also on pages 346 and 347, "To conclude, and not subject ourselves to our own previous criticism of proceeding upon assumptions not founded on the evidence in the case, we shall content ourselves by saying that, upon the facts stated and certified to us by the judges of the Circuit Court of Appeals, we cannot, as a matter of law, based upon those facts and upon such common knowledge as we, as a court, can be supposed to possess, hold a conductor of a freight train to be a vice-principal, within any safe definition of that relation."

See the following cases:

Harrison vs. Railroad Co., 77 Mich., 409.
Malcolm vs. Fuller, 152 Massachusetts, 428.
Carlson vs. N. W. Telephone Exchange Co., 63 Minnesota, 428.
Tailor vs. Railway Co., 121 Indiana, 124.
Railway Co. vs. May, 108 Illinois, 288.
Gormley vs. Vulcan Iron Works, 61 Missouri, 492.
Smith vs. Wabash Railway Co., 92 Missouri, 366.
Schroeder vs. Railway Co., 108 Missouri, 322.
Lasky vs. Railway Co., 83 Maine, 461.
Patton vs. Railway Co., 96 North Carolina, 455.
McGovern vs. Railway Co., 123 New York, 281.
Eldredge vs. Steamship Co., 134 New York, 187.
Railroad Co. vs. Fort, 17 Wallace, 553.
Borgman vs. Railway Co., 41 Federal, 667.
Thompson vs. Railway Co., 14 Federal, 564.

The analogies of the general rule of the municipal law exempting the master from liability for injury to a servant caused by the negligence of a fellow servant, do not apply to the master of a vessel and ordinary seamen when the vessel is at sea. On land, if an incompetent or unfit servant is introduced or retained in the service of the master, a fellow servant has the right, growing out of the contract, to demand of the master correction of the wrong, and, if not done to quit the service. He has the means of protect-

ing himself against negligent and improper orders of those he is obliged to obey and can leave the employment of the common master if obedience to an order involves his personal safety. However, under the maritime law the master of the ship has plenary powers, as the agent and representative of the owners. He selects, hires and discharges the seamen at his pleasure. He has absolute and supreme control of the management and navigation of the vessel with which the owners themselves cannot interfere. He determines all matters of discipline, and the kind of punishment to be inflicted for disobedience to the orders of the officers of the ship. While on ship board he is "master" in fact as well as in name. He is absolute monarch and his word is law and for disobedience to his orders the crew, passengers and all persons on board the ship, can be disciplined in his discretion. He may, when necessary, purchase supplies upon the credit of the ship, and in certain emergencies, hypothecate and even sell it without the knowledge or consent of the owners. It would be hard to conceive of a case in which the owners have delegated a more complete authority and control. They are not in charge of the vessel but remain upon the land. The mere fact that the maritime law gives certain powers to the master is not a reason for exempting the owners from liability for an improper exercise of such powers. While exercising the powers thus conferred the master is acting in the interest, and for the benefit, of the owners who appoint him. One of the purposes for which the master is employed is to exercise authority and control over the crew in the management and navigation of the ship; in the exercise of that authority and control he is the representative of the owners and not the fellow servant of the crew.

It is submitted that if the questions certified are to be determined upon the principles of the maritime law, or even upon those of the common law applicable as recognized in the best considered cases, the first and third questions should be answered in the affirmative, and the second question in the negative.

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